STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2015
v DWAYNE TODD BOWMAN, Defendant-Appellant.	No. 318868 Wayne Circuit Court LC No. 13-002306-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DARIAN DESHAUN BRADFORD, Defendant-Appellant.	No. 319012 Wayne Circuit Court LC No. 13-002306-FC

Before: BECKERING, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

The prosecution charged defendants, Dwayne Todd Bowman and Darian Deshaun Bradford, together in a joint bench trial. The court convicted both defendants of two counts each of armed robbery, MCL 750.529, one count each of first-degree home invasion, MCL 750.110a(2), and one count each of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court also convicted defendant Bradford of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). The court sentenced defendant Bowman to prison terms of 200 to 400 months for each armed robbery conviction and 120 to 240 months for the home invasion conviction, to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. The court sentenced defendant Bradford to prison terms of 180 to 360 months for each armed robbery conviction, 120 to 240 months for the home invasion conviction, one to four years for the marijuana conviction, all to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. Both defendants appeal as of right. We affirm in both appeals.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendants' convictions arise from a home invasion and robbery at a home in Detroit. An adult female, Telease, and five children were in the home when they heard a knock at the side door. When a 14-year-old child opened the door, a man put a pistol to the child's head and told him to move back into the house. The boy testified that there were two men carrying guns and wearing masks. According to Telease, both men rummaged through the contents of her purse before the taller man proceeded upstairs. The shorter man instructed Telease to remove her clothing and ordered the 14-year-old child to lie on the floor. The shorter man held a gun to the boy's back and stated, "[Y]ou're gonna be the first one to go cause you're just another n on the streets." He then unplugged a Play Station unit and placed it in his backpack.

One of the children, a ten-year-old boy, was able to escape through the front door when the men initially entered the house through the side door. He ran to a friend's house and his friend's father contacted the police. The police arrived to find the occupants of the house lying on the living room floor. The occupants informed the police that the two gunmen were upstairs. The police discovered the two defendants in an upstairs bedroom. The bedroom window was broken and defendant Bowman attempted to climb out the window before being captured by the police. Defendant Bowman threw a .22 caliber revolver out the window. The police discovered .22 caliber ammunition in defendant Bowman's pocket and a Play Station unit in his backpack. The police discovered a large bag of marijuana in a duffle bag that defendant Bradford was carrying, and later found $207, and four social security cards belonging to the occupants of the house in defendant Bradford's pockets. When defendant Bradford surrendered to police officers, one of the officers observed .30 caliber bullets fall out of his jacket pocket. Police officers discovered a .30 caliber rifle in the kitchen while they were searching the home.

Defendant Bradford testified in his own defense. He testified that he went to the victims' house to purchase marijuana and that Telease invited him into the house. He denied being associated with defendant Bowman, and claimed that Bowman was already at the house when he arrived. He claimed that he and Telease got into an argument over the price of the marijuana, during which one of the children left the house and summoned the police. When the police arrived, he went upstairs because he was scared. He denied participating in any robbery, possessing a gun, or taking any property that did not belong to him. He claimed that the police "planted" evidence on him at the time of his arrest. Defendant Bowman did not testify.

II. SUFFICIENCY OF THE EVIDENCE

Both defendants argue that there was insufficient evidence to support their convictions of armed robbery and first-degree home invasion. We disagree. A claim of insufficient evidence is reviewed de novo by reviewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466

Mich 417, 428; 646 NW2d 158 (2002); *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). This Court will not interfere with the fact-finder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

A. ARMED ROBBERY

In order to establish the elements of armed robbery, MCL 750.529, the prosecutor must prove that:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

Both defendants rely on selective portions of testimony, and particularly the testimony of defendant Bradford, to argue that there was no evidence that they were associated with each other or acted in concert to commit any robbery. They both contend that the evidence showed, at most, that any robbery was committed by the other defendant, acting alone. Viewing the evidence in a light most favorable to the prosecution, we reject this claim of error.

Although witnesses sometimes referred to "one man" in their testimony, Telease, the older child, and the younger child all testified that two men, both armed with guns and both with their faces partially covered, entered the house and threatened the occupants after the older child answered a knock on the door. According to Telease, the shorter man repeatedly asked what they had in the house. This testimony supports an inference that the men entered the house for the purpose of committing a robbery. Telease and the older child consistently testified that the shorter man pointed a gun at the older child, verbally threatened the older child by telling him that he would be "the first to go," and that the taller man went upstairs. Telease and the older child both testified that the shorter man took a Play Station game unit. And, Telease testified that both of the men went through the contents of her purse. According to Telease, $247, her identification, her social security card, and her children's social security cards were missing from her purse. The older child and Telease both testified that the police arrived while the men were still present at the house.

When the police entered the house, they found defendants Bowman and Bradford in an upstairs bedroom. Witnesses had previously heard the sound of breaking glass. A police officer observed defendant Bowman throw a .22 caliber revolver out a broken bedroom window and attempt to climb out the window. After the two defendants were detained, the police recovered .22 caliber bullets from defendant Bowman's coat pocket and found the Play Station unit inside a backpack that Bowman was carrying. A search of defendant Bradford led to the discovery of .30 caliber ammunition, social security cards belonging to Telease and her children, and $207.

Although defendant Bradford denied being associated with defendant Bowman, denied arriving at the same time as defendant Bowman, denied possessing a gun or ammunition, denied taking any money or property, and claimed that the police planted evidence on him, the credibility of his testimony was for the trier of fact to resolve. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendants Bowman and Bradford entered the house together after the older child opened the door, that both men were armed with guns, and that both men committed a larceny by force or assault. The evidence allowed the trial court to infer that defendant Bowman was the shorter man who pointed the gun at the older child, verbally threatened him, and took the Play Station unit, and that defendant Bradford was the taller gunman who went upstairs. Defendant Bradford's possession of $207 and the social security cards belonging to Telease and her children also allowed the court to infer that he was the gunman who took these items from Telease's purse. Although both defendants maintain that their purported attempt to escape through a broken bedroom window is not evidence of guilt, the trial court was permitted to infer from this evidence that the defendants were attempting to flee the house and evade the police because of their consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). The evidence was sufficient to support each defendant's convictions of armed robbery.

In so finding, we reject any assertion that the evidence produced at trial was sufficient to support one, but not both, of each defendants' armed robbery convictions. As noted, the evidence supported that each defendant, acting as a principal, committed one armed robbery while inside the house—defendant Bowman took the Play Station and defendant Bradford took the social security cards. The evidence was also sufficient to support a second conviction for armed robbery under an aiding and abetting theory. Aiding and abetting is a "theory of prosecution that permits the imposition of vicarious liability for accomplices." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (internal quotations marks omitted). The elements of aiding and abetting are:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*Id.* (citation and quotation omitted.)]

Here, there was sufficient evidence that each defendant aided and abetted the other's commission of armed robbery. When viewed in a light most favorable to the prosecution, the testimony established that the men entered the home together, armed and wearing masks or bandannas, and began taking the possession of the occupants. The victims' testimony established that defendants spoke to each other in the home and that they acted in concert while they were inside the home. Defendants, who briefly separated while inside the home, ran upstairs together when the police arrived. Taken in a light most favorable to the prosecution, the evidence was sufficient to allow the trial court to find, beyond a reasonable doubt, that each defendant gave encouragement and/or assisted in the commission of an armed robbery by the other, and that they intended the commission of the crime and/or had knowledge that the other intended the commission of the crime. See *id.* See also *People v Bennett*, 290 Mich App 465,

474: 802 NW2d 627 (2010) (explaining that an aider and abettor's state of mind may be inferred from circumstantial evidence).

B. FIRST-DEGREE HOME INVASION

The home invasion statute, MCL 750.110a, provides, in pertinent part:

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, *a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling*, or a person who breaks and enters a dwelling or enters a dwelling without permission *and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault* is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling. [Emphasis added.]

In *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), our Supreme Court observed that there are several ways in which first-degree home invasion can be committed. The Court broke down the alternative elements of first-degree home invasion as follows:

> Element One: The defendant *either*:
>
> 1. breaks and enters a dwelling or
>
> 2. enters a dwelling without permission.
>
> Element Two: The defendant *either*:
>
> 1. intends when entering to commit a felony, larceny, or assault in the dwelling or
>
> 2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny or assault.
>
> Element Three: While the defendant is entering, present in, or exiting the dwelling, *either*:
>
> 1. the defendant is armed with a dangerous weapon or
>
> 2. another person is lawfully present in the dwelling. [*Id.*]

The evidence that one of the men put a pistol to the older child's head when he answered the door and that two armed men then entered the house was sufficient to prove that both men entered the dwelling without permission, thereby satisfying the first element. The evidence that the men threatened the occupants, that one man demanded to know what was in the house, and

that the men took a Play Station unit and items of property from Telease's purse, viewed most favorably to the prosecution, was sufficient to prove both alternative prongs of the second element of first-degree home invasion, namely, that the men entered the dwelling with the intent to commit a robbery, and in fact actually committed a robbery inside the dwelling. Further, the evidence that the two armed men went upstairs when the police arrived, that the police discovered defendants Bowman and Bradford inside one of the upstairs bedrooms, and that both men possessed items of property that had been taken from the victims, allowed the court to infer that defendants Bowman and Bradford were the persons who entered the dwelling at gunpoint and robbed the occupants of the house. Lastly, in light of the testimony that both men were armed with guns and that Telease, her brother, and Telease's children were all lawfully present in the dwelling when the gunmen entered, the evidence was sufficient to prove both alternative prongs of the third element of first-degree home invasion, namely, that both defendants were armed with a dangerous weapon while inside the dwelling, and that another person was lawfully present in the dwelling at the time. Accordingly, the evidence was sufficient to support each defendant's conviction of first-degree home invasion.

III. SENTENCING

Both defendants argue that the trial court erred in assessing ten points for offense variable (OV) 4, MCL 777.34, serious psychological injury to a victim. Determining whether a trial court properly scored the sentencing guidelines variables is a two-step process. First, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that an error occurred. *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012). Second, the appellate court considers de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy*, 494 Mich at 438.

Offense variable 4 addresses psychological injury to a victim. The trial court may assess ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). Although defendants observe that there was no evidence that any victim actually sought professional treatment, MCL 777.34(2) states that ten points should be assigned for OV 4 "if the serious psychological injury *may* require professional treatment[,]" and clarifies that "[i]n making this determination, the fact that treatment has not been sought is not conclusive." (Emphasis added).

Defendant Bradford's reliance on *People v Lockett*, 295 Mich App 165; 814 NW2d 295 (2012), and *People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003), in support of his argument that there was no evidence to support a ten-point score for OV 4 is misplaced. In *Lockett*, 295 Mich App at 183, this Court held that "[t]he trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury '*occurred* to a victim.' " Accordingly, this Court held that ten points were improperly scored for OV 4 where "[t]here was no testimony indicating [the child] suffered psychological injury, the presentence report contain[ed] no information that would indicate any victims suffered psychological harm, and the record does not include a victim-impact statement." In *Hicks*, 259 Mich App at 534-535, this Court determined that OV 4 was appropriately assessed zero points where the victim's purse was forcefully snatched from

her arm while she was at a gas station and the record did not contain any evidence of serious psychological harm to the victim or give any indication that she needed psychological treatment.

In contrast to *Lockett* and *Hicks*, a victim impact statement for each defendant's presentence report states that Telease reported that although no one was physically harmed during the offense, she and the children "are afraid because the defendant's [sic] know where they live." Further, the evidence at trial indicated that the offense was committed at night, in the presence of an adult female and several smaller children. During the offense, defendant Bowman told one child, "[Y]ou're gonna be the first one to go cause you're just another n on the street" and "now I know who your sister is." A young child who was able to escape during the offense testified that he was very scared when he left the house because he thought the men were going to shoot somebody, and one of the responding police officers testified that this child was crying hysterically when she first saw him. Another child testified that she thought the men were "about to shoot all of us," and she continuously asked the gunmen if they were going to hurt her mother. Telease kept telling the gunmen to take whatever they wanted, "just don't hurt anyone." According to the police officers who responded to the home, Telease and the children were on the floor crying when they entered the house.

The trial testimony indicates that the victims experienced a terrifying event, and the testimony describing their emotional states and reactions during the offense indicates that they were all fearful and terrified during the encounter. This evidence, together with the victim impact statements indicating that all of the victims remained in fear after the offense, supports the trial court's finding of a psychological injury that may require professional treatment. See *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012). Accordingly, the trial court did not err in assessing ten points for OV 4.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Bradford argues that a new trial is required because his defense counsel was ineffective for failing to adequately investigate his Attention Deficit Hyperactivity Disorder (ADHD), which he maintains affected his counsel's trial preparation and strategy. In making this argument, defendant Bradford relies solely on an isolated statement his trial counsel made at sentencing. Specifically, he notes that his counsel informed the trial court, while asking that defendant Bradford be sentenced at the low end of the guidelines range, that "[w]hat is unfortunate in this case is that he was diagnosed with ADHD. I don't know what that would have meant in terms of proceeding with this case, but it may have caused me to take a different action with regard to his testifying, if the Court please." Defendant Bradford contends that the above statement shows that trial counsel did not know about his ADHD and that counsel's lack of knowledge in this regard makes it "painfully evident that defense counsel spent almost no time with the [d]efendant preparing for trial."

Because defendant Bradford did not raise this ineffective assistance of counsel issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to errors apparent

[1] People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).

from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Effective assistance of counsel is presumed, and defendant Bradford bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *Id.* at 579. To establish his claim of ineffective assistance of counsel, defendant Bradford must show "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, inadequate investigation or preparation alone does not establish ineffective assistance of counsel. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). A defendant must also show that counsel's inadequate preparation resulted in counsel's ignorance of valuable evidence which would have substantially benefited the defendant. *Id.*

The existing record does not support defendant Bradford's contention that his trial counsel failed to conduct an adequate investigation. Defendant Bradford has offered nothing, beyond his unsupported assertions, indicating that trial counsel's performance was objectively unreasonable for counsel's alleged failure to discover defendant Bradford's ADHD. On this record, defendant Bradford has not established that his trial counsel performed an inadequate or otherwise deficient investigation. Thus, he cannot overcome the presumption that trial counsel's performance was objectively reasonable. Further, defendant Bradford offers nothing, beyond his bald, sweeping assertions, to suggest that counsel's knowledge of his ADHD could have been beneficial at trial. Indeed, defendant Bradford summarily asserts that counsel's alleged ignorance of his ADHD condition "deprived him of possible defenses that could have changed the outcome of the [d]efendant's trial," but he does not explain what defenses counsel could have presented had he been aware of this condition. A defendant bears the burden of establishing the factual predicate for his ineffective assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). On this record, defendant Bradford cannot satisfy either prong of his ineffective assistance of counsel claim.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Mark T. Boonstra